HP PROJECTS SDN BHD

v.

INVESTPROP (M) SDN BHD

COURT OF APPEAL, PUTRAJAYA
ABDUL MALEK AHMAD PCA
TENGKU BAHARUDIN SHAH JCA
JAMES FOONG JCA
[CIVIL APPEAL NO: W-04-29-2001]
27 JULY 2005

LANDLORD AND TENANT: *Determination - Tenancy agreement, termination of - Whether landlord failed to comply with pre-condition of tenancy agreement of termination by way of re-entry by landlord onto said premises - Whether landlord had waived its rights to terminate tenancy agreement - Whether summary judgment for vacant possession ought to be granted - Subordinate Courts Rules 1980, O. 26A*

CONTRACT: *Tenancy agreement - Termination of - Whether landlord failed to comply with pre-condition of tenancy agreement of termination by way of re-entry by landlord onto said premises - Whether landlord had waived its rights to terminate tenancy agreement - Whether summary judgment for vacant possession ought to be granted - Subordinate Courts Rules 1980, O. 26A*

CIVIL PROCEDURE: *Summary judgment - Landlord and tenant - Termination of tenancy agreement - Whether landlord failed to comply with pre-condition of tenancy agreement of termination by way of re-entry by landlord onto said premises - Whether landlord had waived its rights to terminate tenancy agreement - Whether summary judgment for vacant possession ought to be granted - Subordinate Courts Rules 1980, O. 26A*

The respondent/landlord, which had rented a double-storey building ('the said premises') to the appellant, gave notice in writing through its solicitors on 10 May 1994, to the appellant that the tenancy agreement would be terminated with effect from that date thereof and that vacant possession of the said premises be surrendered to the respondent forthwith. When the appellant failed to vacate the said premises, the respondent commenced this action for vacant possession and damages in the Sessions Court. Subsequent to the filing of this action, the respondent took out an application for summary judgment under O. 26A of the Subordinate Courts Rules 1980 ('the SCR') for vacant possession of the said premises and for double rental of RM11,500 per month

from 1 July 1994 until the date of vacant possession. The learned Sessions Court judge allowed this application. Dissatisfied, the appellant appealed to the High Court, which dismissed the appeal. Hence, the present appeal. The appellant put forward two grounds to support its contention that the learned High Court judge had erred in upholding the Sessions Court's ruling against the appellant, they being that: (i) the respondent did not comply with a pre-condition stipulated in cl. 7(b) of the tenancy agreement stating that the tenancy agreement should only be terminated in the event of a breach by the tenant with a re-entry onto the said premises by the landlord. Instead, the respondent relied on its solicitors' letter of 10 May 1994 to effect the termination; and (ii) the respondent had waived its rights to terminate the tenancy agreement when the respondent accepted rental payment from the appellant as late as 12 November 1994, a date after the purported termination.

Held (dismissing the appeal):
Per James Foong JCA:

[1] Although termination of the tenancy agreement ought to be by way of a re-entry as provided by cl. 7(b) of the tenancy agreement, there were times when such mode of termination, which often involved some form of physical exertion, would not be desirable, particularly where animosity existed between the landlord and tenant. Therefore, even though the respondent did not physically re-enter the said premises, its filing of this action and serving the summons on the appellant on 14 December 1994 was sufficient to constitute re-entry into the said premises under cl. 7(b) of the tenancy agreement. The tenancy agreement was thus terminated as of 14 December 1994, and as such, the appellant's contention that the learned High Court judge had erred in upholding the decision of the Sessions Court could not be accepted. The only error in the High Court's decision was on the date of termination, not there being no lawful termination. (p 858 b-h)

[2] In respect of the issue of waiver, since the date of lawful termination was 14 December 1994, there was no waiver on the part of the respondent in accepting such rental as the tenancy was still subsisting at that material time. The respondent had every right during the subsistence of the tenancy to collect rental. However, with the effective date of termination of the tenancy agreement fixed at 14 December 1994, the appellant should only be liable to pay mesne profits from 14 December 1994 until the time when the appellant vacated the said premises on 10 July 1997. Prior to

this date, the respondent could only charge rental for the said premises on the basis that the tenancy was still subsisting but after this date, the appellant was liable to pay mesne profits for the period of overstay since the tenancy agreement had been terminated. (p 859 b-e)

[3] For the aforesaid reasons, the appeal was dismissed with costs. The High Court decision affirming the Sessions Court order for summary judgment under O. 26A of the SCR was upheld except for the calculation of mesne profits, which should commence from 14 December 1994 until 10 July 1997 at RM11,500 per month with interest of 8% thereon, and not from 10 May 1994. (p 859 f)

[Order accordingly.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Pada 10 Mei 1994, melalui peguamnya, responden/tuantanah, yang menyewa sebuah premis dua tingkat kepada perayu ('premis tersebut'), telah memberi notis bertulis kepada perayu bahawa perjanjian tenansi di antara mereka telah ditamatkan dengan serta merta sambil meminta supaya perayu menyerahkan milikan kosong premis tersebut. Perayu gagal mengosongkan premis tersebut dan responden memulakan tindakan di Mahkamah Sesyen menuntut gantirugi dan milikan kosong. Berikutnya, responden memohon penghakiman terus di bawah A. 26A Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR') bagi milikan kosong premis tersebut serta sewa berganda RM11,500 sebulan bermula 1 Julai 1994 hingga ke tarikh pemulangan milikan kosong. Permohonan dibenarkan oleh yang arif hakim Mahkamah Sesyen. Tidak berpuas hati, perayu merayu ke Mahkamah Tinggi tetapi rayuannya ditolak. Perayu merayu lagi. Di Mahkamah Rayuan, perayu mengemukakan dua alasan mengapa yang arif hakim Mahkamah Tinggi dikatakan khilaf apabila mempertahankan keputusan Mahkamah Sesyen, iaitu: (i) responden tidak mematuhi pra-syarat di perenggan 7(b) perjanjian tenansi yang menyatakan bahawa perjanjian tenansi hanya boleh ditamatkan jika berlaku pelanggaran oleh penyewa iaitu dengan cara tuantanah memasuki semula premis tersebut. Sedangkan, dalam kes ini, responden bergantung kepada surat peguamnya yang bertarikh 10 Mei 1994 untuk menamatkan tenansi; dan (ii) responden telah melupuskan haknya untuk menamatkan tenansi kerana telah menerima bayaran sewa dari perayu sehingga ke tarikh 12 November 1994, iaitu selepas ia menamatkan tenansi.

Diputuskan (menolak rayuan)
Oleh James Foong HMR:

[1] Walaupun penamatan perjanjian tenansi adalah melalui kemasukan semula responden seperti yang diperuntukkan perenggan 7(b) perjanjian tersebut, ada masa-masanya di mana cara penamatan sedemikian, yang sering melibatkan penggunaan kaedah fizikal, tidak sesuai, terutama jika wujud permusuhan di antara tuantanah dan penyewa. Oleh itu, walaupun responden tidak memasuki semula premis tersebut secara fizikal, pemfailan tindakan di sini olehnya, serta penyampaian saman ke atas perayu pada 14 Disember 1994, mencukupi untuk menjadikannya suatu kemasukan semula ke dalam premis tersebut di bawah perenggan 7(b) perjanjian tenansi. Perjanjian tenansi, dengan itu, telah ditamatkan pada 14 Disember 1994, dan dengan demikian, hujah perayu bahawa yang arif hakim Mahkamah Tinggi khilaf dalam mempertahankan keputusan Mahkamah Sesyen tidak boleh diterima. Kekhilafan yang wujud pada keputusan Mahkamah Tinggi hanyalah mengenai tarikh penamatan, bukan mengenai kewujudan suatu penamatan yang sah.

[2] Berkaitan isu pelupusan (waiver), oleh kerana tarikh penamatan sah adalah 14 Disember 1994, tidak ada pelupusan oleh pihak responden walaupun telah menerima sewa yang berkenaan kerana tenansi pada waktu itu masih lagi berkuatkuasa. Responden mempunyai hak untuk mengutip sewa semasa tenansi masih berkuatkuasa. Bagaimanapun, dengan tamatnya perjanjian tenansi pada 14 Disember 1994, perayu hanya bertanggungan untuk membayar keuntungan mesne dari 14 Disember 1994 sehinggalah perayu mengosongkan premis tersebut pada 10 Julai 1997. Sebelum tarikh ini, responden hanya boleh mengenakan sewa bagi premis tersebut atas dasar bahawa tenansi masih wujud, tetapi selepas tarikh itu, perayu bertanggungan untuk membayar keuntungan mesne kerana tinggal melebihi masa selepas tenansi ditamatkan.

[3] Atas alasan-alasan di atas, rayuan ditolak dengan kos. Keputusan Mahkamah Tinggi mengesahkan perintah Mahkamah Sesyen membenarkan penghakiman terus di bawah A. 26A KMR adalah dipertahankan, kecuali berhubung dengan pengiraan keuntungan mesne, yang patut bermula dari 14 Disember 1994, dan bukannya 10 Mei 1994, hingga 10 Julai 1997 pada kadar RM11,500 sebulan dengan faedah 8%.

[Perintah sekadarnya.]

Case(s) referred to:
Canas Property Co Ltd v. KL Television Services Ltd [1970] 2 All ER 795 ***(refd)***
Jones v. Carter [1846] 15 M & W 1040 ***(refd)***
Serjeant v. Nash, Field & Co & Another [1903] 2 KB 304 ***(refd)***
Woolwich Equitable Building Society v. Preston [1938] Ch 129 ***(refd)***

Legislation referred to:
Specific Relief Act 1950, s. 8
Subordinate Courts Rules 1980, O. 26A

For the appellant - BE Teh; M/s Teh & Assoc
For the respondent - TM Eng (Wan Shaifuddin Ab Wahid with him); M/s Jal & Lim

[Appeal from High Court, Kuala Lumpur; Civil Appeal No: R1-12-53-1996]

Reported by Suresh Nathan

JUDGMENT

James Foong JCA:

Introduction

In this appeal the respondent, who was the landlord of a double storey building known as Lot 741, Jalan Sultan Ismail, Kuala Lumpur (the said premises), had rented to the appellant the said premises for a sum of RM5,750 per month for a period of three years commencing from 1 October 1992. This tenancy is evidenced by a written agreement dated 26 April 1993. According to the respondent, the appellant had breached a term of this tenancy agreement by failing to secure approval from the relevant authorities to renovate the said premises into a restaurant and to operate as such. This warranted the respondent to terminate the tenancy and to reclaim possession of the said premises. To activate this, the respondent, through its solicitors, on 10 May 1994, gave notice in writing to the appellant that the tenancy agreement would be terminated with effect from that date thereof and that vacant possession of the said premises be surrendered to the respondent forthwith. This letter added:

> unless you quit and deliver vacant possession of the abovecaptioned premises to our client on or before the 30th June, 1994, you shall be liable to pay **double rental** and/or mesne profits at RM11,500.00 per month calculated from 1st July, 1994 till date of actual delivery of vacant possession ... .

When the appellant failed to vacate the said premises, the respondent commenced this action in the Sessions Court on 24 November 1994. The prayers listed in the statement of claim are:

(a) an order that the appellant and all persons claiming through and/or under them vacate and deliver vacant possession of the said premises to the respondent;

(b) general damages;

(c) interest thereon at the rate of 8% per annum from the date hereof to the date of full payment;

(d) double rental at the rate of RM11,500 a month from 1 July 1994 until date of actual delivery;

(e) an indemnity and/or contribution to the extent of 100% pursuant to claims by the authorities for the demolition of unlawful structures constructed on the said premises and the use of the said premises as a restaurant;

(f) interest thereon at the rate of 8% per annum from 1 July 1994 to the date of full settlement on paragraph (d) herein and;

(g) costs of this action.

Subsequent to the filing of this action, the respondent took out an application for summary judgment under O. 26A of the Subordinate Courts Rules 1980 for vacant possession of the said premises and for double rental of RM11,500 per month from 1 July 1994 till date of vacant possession. The learned Sessions Court Judge allowed this application.

Dissatisfied, the appellant appealed to the High Court. The High Court dismissed the appeal; thus this appeal before us.

Appellant's Contentions

Mr. Teh, counsel for the appellant, informed this court that he is limiting his appeal to only two grounds to support his contention that the learned High Court Judge has erred in upholding the Sessions Court's ruling against the appellant. These are:

1. The respondent did not comply with a pre-condition stipulated in cl. 7(b) of the tenancy agreement which says that the tenancy agreement shall only be terminated in the event of a breach by the tenant with a re-entry onto the said premises by the landlord. Instead, the respondent relied on its solicitors' letter of 10 May 1994 to effect the termination.

2. The respondent has waived its rights to terminate the tenancy agreement when the respondent accepted rental payment from the appellant as late as 12 November 1994, the date after the purported termination.

Subsequent Events

Before we proceed to analyze the contentions of the appellant against the contrary arguments of the respondent's counsel, it is pertinent to note the following events had taken place subsequent or consequential to the decisions of the Sessions Court and the High Court:

1. The appellant has vacated the said premises on 10 July 1997.

2. The appellant has paid to the respondent a sum of RM417,709.68 being double rental for the said premises calculated from 1 July 1994 till 10 July 1997 (RM11,500 x 36 months and 10 days).

1st Issue: Termination

There is no doubt that cl. 7(b) of the tenancy agreement specifies that the respondent, as landlord, "shall be at liberty to re-enter upon the said Premises or any part thereof in the name of the whole and thereupon this Agreement shall absolutely determine but without prejudice to any remedy or right of action of the Landlord in respect of any breach of the terms conditions or stipulations herein contained." And it is obvious from the facts disclosed that the respondent did not abide by this procedure to terminate the said tenancy agreement. The respondent only relied on its solicitors' letter of 10 May 1994 to effect termination.

Realizing this defect, respondent's counsel, Ms. Eng, first attempted to convince us that the first contention of the appellant is not pleaded in the statement of defence. But this is not correct. Paragraph 12 of the statement of defence declares that the "termination by the plaintiff of the tenancy is wrongful". Though this may be wanting in particulars but in our view, it is sufficient to justify that this issue has been pleaded.

Ms. Eng then argued that aside from the mode of termination as discussed, the respondent, as landlord, has another right or remedy to terminate the tenancy agreement and this was done by way of the letter of termination of 10 May 1994. This alternative right or remedy is provided by cl. 7(b) where the last four lines of this clause state: "but without prejudice to any remedy or right of action of the landlord in respect of any breach of the terms and conditions or stipulations herein contained".

We are not attracted by this argument. We are of the view that this phrase "but without prejudice to any remedy or right of action of the landlord in respect of any breach of the terms and conditions or stipulations herein contained" only permits the landlord to commence an action or institute a remedy against the tenant in respect of a breach of the tenancy agreement other than for termination of the tenancy. The reason is because the right to

terminate as a result of a breach of the said agreement is already provided and catered for immediately antecedent to this phrase. Thus this additional remedy or right must be limited and restricted to a remedy or right of action of the landlord for a breach committed by the tenant other than for termination of the tenancy agreement.

Though we are in agreement with the contention of the appellant that termination of the tenancy agreement ought to be by way of a re-entry as provided by cl. 7(b) of the tenancy agreement, but there are times when such mode of termination, which often involves some form of physical exertion, may not be desirable, particularly where animosity exists between the landlord and tenant. And if an attempt to re-enter is met with a refusal from the tenant, the landlord may be subjected to a claim by the tenant under s. 8 of the Specific Relief Act 1950 which states that: "If any person is disposed without his consent of immovable property otherwise than in due course of the law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in the suit". To overcome such a dubious and dangerous course, the best alternative is by filing of an action against the tenant claiming possession of the demised premises. Such action is accepted as being equivalent to a physical re-entry – see *Jones v. Carter* [1846] 15 M & W 1040 (718); *Serjeant v. Nash, Field & Co., and Another* [1903] 2 KB 304 and *Woolwich Equitable Building Society v. Preston* [1938] Ch 129. As to when termination is considered to have taken place under such circumstances, Lord Denning MR in *Canas Property Co Ltd v. KL Television Services Ltd* [1970] 2 All ER 795, has declared that it should be the time of service of the writ or summons. The reason is simple: It is the time when the tenant is considered to be aware of the forfeiture of the tenancy. We find all these propositions rational and shall apply them to the facts of this instant case.

Though the respondent did not physically re-enter the said premises, but by their filing this action and serving the summons on the appellant on 14 December 1994, we consider them sufficient to constitute a re-entry into the said premises under cl. 7(b) of the tenancy agreement. We thus find that the tenancy agreement has been terminated as of 14 December 1994.

With a termination of the tenancy agreement properly constituted, we are unable to accept the appellant's contention that the learned High Court Judge has erred in upholding the decision of the Sessions Court. We wish to reiterate that the tenancy agreement has been terminated; the only error in the High Court's decision is on the date of termination, not there being no lawful termination.

Waiver

We now move onto the next issue of waiver. We are of the view that this claim of the appellant should be considered in relation to the date of the termination of the tenancy agreement. If such rental was accepted by the respondent subsequent to the date of termination then there may be merits in the appellant's argument; otherwise it should be rejected. The reason is simple: If it was before then there is no issue since the tenancy was still subsisting. If it was after, then such act may amount to a waiver on the part of the respondent, as landlord, to terminate the tenancy. In this case, since the date of lawful termination is 14 Decmber 1994, there is no waiver on the part of the respondent in accepting such rental as the tenancy was still subsisting at that material time. The respondent has every right during the subsistence of the tenancy to collect rental.

Mesne Profits

Mr. Teh has complained that the respondent has over charged the appellant on mesne profits. With the effective date of termination of the tenancy agreement fixed at 14 December 1994, it is our view that the appellant should only be liable to pay mesne profits from 14 December 1994 till the time when the appellant vacated the said premises on 10 July 1997. Prior to this date, the respondent can only charge rental for the said premises on the basis that the tenancy is still subsisting. But after this date, as the tenancy agreement has terminated, the appellant is liable to pay mesne profits for the period of overstay.

Conclusion

For the reasons aforesaid, we dismiss this appeal with costs. We uphold the High Court's decision affirming the Sessions Court order for summary judgment under O. 26A of the Subordinate Courts Rules 1980 except for the calculation of mesne profits, which should commence from 14 December 1994 till 10 July 1997 at RM11,500 per month with interest of 8% thereon and not from 10 May 1994.

We also order that the deposit is to go to the respondent towards taxed costs.